Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

IAIN FRASER, *et al.*,
Petitioners,

v.

MAJOR LEAGUE SOCCER, L.L.C., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES W. QUINN
JEFFREY L. KESSLER
GREGORY S. COLEMAN *
MICHAEL A. RONA
JOHN F. GREENMAN
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

114 pg

QUESTIONS PRESENTED

I.

Does an antitrust plaintiff who proves concerted action, overt acts, and a specific intent to monopolize also have to prove a relevant market as an essential element of a claim of combination or conspiracy to monopolize in violation of §2 of the Sherman Act?

II.

Did the court of appeals improperly deprive petitioners of their right to a trial by jury when it rejected the basis of the trial court's summary judgment against petitioners' claims under §1 of the Sherman Act, but nonetheless refused to remand those claims for trial based on speculative factual assumptions by the court of appeals about how they would have been tried to a jury?

PARTIES TO PROCEEDINGS BELOW

Plaintiffs/Appellants Below

Iain Fraser; Steve Trittschuh; Sean Bowers; Mark Semioli; Rhett Harty; David Scott Vaudreuil; Mark Dodd; and Mark Dougherty.

Defendants/Appellees Below

Major League Soccer, L.L.C.; Kraft Soccer, L.P.; Anschutz Soccer, Inc.; Anschutz Chicago Soccer, Inc.; South Florida Soccer, L.L.C., Team Columbus Soccer, L.L.C.; Team Kansas City Soccer, L.L.C.; Los Angeles Soccer Partners, L.P.; Empire Soccer Club, L.P.; Washington Soccer, L.P.; and United States Soccer Federation, Inc.

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PETITION FOR WRIT OF CERTIORARI

Major League Soccer, L.L.C. (MLS) and its separately owned operator/investors (the "MLS Defendants")—the entities controlling the only top-tier (Division I) soccer league in the United States—conspired with the United States Soccer Federation, Inc. (USSF), with the specific intent to exclude competitors and fix below-market salaries for Division I soccer players in the United States. The court of appeals held that plaintiffs, a class of professional soccer players, were required to prove not just concerted behavior, overt acts, and a specific intent to monopolize, but also the existence of a relevant market in order to challenge this anticompetitive scheme as a combination or conspiracy to monopolize in violation of §2 of the Sherman Act. The court of appeals' adoption of this minority position ignored the text of the Sherman Act, deepened an existing split among the circuits, and substantially undermined a significant area of antitrust

policy. Plaintiffs ask the Court to grant this petition to resolve the increasing judicial confusion about this important federal question. Plaintiffs also ask the Court to grant this petition to make it clear that a court of appeals cannot deprive plaintiffs of their right to a trial by jury by simply assuming facts about how they would have tried their claims, in this case under §1 of the Sherman Act, had they been given an opportunity to do so.

CITATION OF COURT OF APPEALS OPINION

Fraser v. Major League Soccer, L.L.C., 284 F.3d 47 (CA1 2002).

BASIS FOR JURISDICTION

The United States Court of Appeals for the First Circuit delivered its judgment and opinion in *Fraser* on March 20, 2002. The petition for rehearing en banc was denied on April 23, 2002. The Court has jurisdiction to hear this petition for certiorari under 28 U.S.C. §1254.

STATUTES INVOLVED

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

15 U.S.C. §1.

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine."

15 U.S.C. §2.

STATEMENT OF THE CASE

This lawsuit arises from the anticompetitive agreement of defendants—the entities that control Division I soccer in the United States—to suppress player salaries to below-market levels by eliminating competition in two ways. First, they agreed upon a set of restraints in which the independently owned MLS operator/investors—unlike the owners of teams in every other major team sport—would be prevented from competing for and hiring players at the team level. Second, the MLS Defendants conspired with the USSF to certify MLS as the only Division I soccer league in the United States and to prevent other leagues from competing for Division I players. The specific purpose of this two-pronged conspiracy was to monopolize and suppress the salaries for Division I soccer players in the United States.

A. History of MLS

In 1988, FIFA, soccer's international governing body, awarded the USSF the right to host the 1994 World Cup soccer tournament in the United States.[1] This event created a business opportunity to establish Division I professional soccer in the United States. Alan Rothenberg, the President of the USSF, developed plans to establish such a league that were expressly intended to enable the teams to pay below-market salaries by eliminating all competition for players' services. A-1529:12-1531:3.[2] Concerned about the obvious antitrust implications of this anticompetitive objective, a 1990 memo mapped out the strategy for trying to evade the constraints of §1 of the Sherman Act by purporting to

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[1] The USSF is a member of FIFA and claims the private right to determine who may be sanctioned as a professional soccer league in the United States.

[2] Citations to the appendix at the court of appeals are cited to as "A-[page number]." Citations to the appendix to this petition are cited as "App. at [page number]."

structure the new league as a "single entity," in which the teams would be precluded from competing with each other for players.

At the same time, the MLS operator/investors and the USSF concluded that to successfully suppress player salaries, they needed to prevent other Division I soccer leagues from forming in the United States and competing for players, noting that to "maintain the [proposed below-market] salary structure" for players, there could be no other "significant domestic professional league to compete for players' services." A-7683. As stated in MLS's business plan:

> "Over the last thirty-five years, the NHL, the NBA and the NHL [sic] have faced challenges from rival professional sports leagues. The American Football League was established in the early 1960s to compete with the [NFL]. The World Hockey Association was established in the early 1970s to compete with the NHL. While the three rival leagues ultimately merged into the more established leagues during the early years of their existence, these rival leagues precipitated bidding wars for the services of established star players and for the services of players graduating from the college ranks. In the event that a credible rival league were established, it is probable that the MLS salary structure would be jeopardized." A-7919.

In fact, in 1993, three different organizations were vying for USSF certification as Division I leagues so that they could compete with each other: Mr. Rothenberg's group, which became MLS; the American Professional Soccer League (APSL); and League One America. At a meeting on December 5, 1993, the USSF, in conspiracy with MLS, decided to sanction MLS as the exclusive Division I league in the United States. This decision blocked all competition because of the inability of other U.S. leagues to compete with MLS without a Division I certification.

During 1994, MLS and the USSF continued to conspire against the APSL, which was still trying to become a Division I competitor. For example, in a memo sent to Hank Steinbrecher, USSF Secretary General, and Richard Motzkin, USSF General Counsel, Rothenberg wrote that "neutrality was over" and instructed Steinbrecher and Motzkin to take actions on behalf of the USSF to prevent the APSL from competing as a Division I league. A-8102.

In 1995, the USSF reaffirmed MLS's designation as the exclusive Division I league in the United States, announcing that it would not even consider granting another league Division I status until 1998. Further, to protect MLS from competition after 1998, the USSF and MLS established additional anticompetitive barriers to entry in the form of professional division standards that no new Division I league would be able to meet. *See* A-6358 at 3051:3-3052:17, A-6359 at 3053:3-3054:15.

B. The MLS Defendants Are Not A Single Entity.

Despite their desire to shield themselves from the strictures of §1 of the Sherman Act, the MLS Defendants never adopted a true single entity structure. Although MLS is a limited liability company that owns all of the teams that play in the league and has "sole responsibility for negotiating and entering into agreements with, and for compensating, Players," 284 F.3d, at 53, the MLS Defendants insisted on maintaining distinct economic interests and autonomy in virtually all team business areas other than the hiring of players. For example, MLS operator/investors have a greater right to relocate, transfer, and receive value for the transfer of their MLS teams than NFL owners. A-3360:11-3361, A-3362:2-25, A-3363:8-3366:18, A-3367:15-3369:24, A-3372:15-3373:7, A-3375:8-22.

Moreover, the MLS operator/investors are separately owned entities who do *not* share profits and losses.

A-680:24-681:16, A-748:12-24, A-749:9-12, A-698:21-699:18, A-698:21-699:18, A-1241, A-702:12-20, A-1352-1353, A-691:9-22, A-695:13-1696:20, A-761:19-762:20, A-541:19-543:24, A-485:19-542:24, A-696:21-697:6. They conduct day-to-day team operations, handle all local marketing, and—subject to approval by the MLS Board (which is itself controlled by the operator/investors)—they negotiate all local broadcasting deals and set ticket prices. A-694:16-24, A-759:9-760:11, A-759:9-16, A-1346.

The MLS operator/investors are also in active competition with each other for all team employees other than players. They compete for general managers, front office personnel and coaches, and they set the salaries of those persons without league involvement. A-691:9-22, A-696:13-20, 761:19-762:20.

In sum, the MLS operator/investors maintain separate economic identities. They are economically indistinguishable from team owners in other sports leagues, except, of course, that they have agreed not to compete with each other for players.

C. The Players' Lawsuit

Eight individual MLS players and a certified injunctive class of Division I professional soccer players (collectively, "Fraser") sued MLS, the USSF, and the nine independent operator/investors in MLS teams. Fraser's first amended complaint alleges that defendants violated §1 of the Sherman Act by agreeing not to compete with each other for players. Fraser also alleges two conspiracies in violation of §2: (1) that MLS and its operator/investors combined and conspired with the USSF with the specific intent to monopolize in order to prevent other U.S. leagues from competing for players at the Division I level; and (2) that

MLS and its operator/investors combined and conspired to eliminate all competition for players among themselves, with the specific intent to monopolize.[3]

The defendants moved for summary judgment on the §1 claim, arguing that the MLS Defendants are a single entity and therefore incapable of conspiring in restraint of trade. The district court granted this motion. *See Fraser v. Major League Soccer*, 97 F.Supp.2d 130 (D. Mass. 2000). Trial was then set on Fraser's §2 claims. Before trial, however, the district court granted the defendants' motion in limine and held that Fraser could not introduce evidence that the conspiracy to eliminate competition among the MLS operator/investors was a violation of §2.

Fraser then proceeded to trial on the remaining §2 conspiracy claim—a charge that MLS and the USSF conspired to monopolize by excluding competing Division I leagues.[4] Over Fraser's objections, the court submitted jury instructions and a special verdict form requiring Fraser to prove the specific relevant market alleged as a threshold element of not just Fraser's claims of monopolization and attempt to monopolize, but also of Fraser's claim of a combination or conspiracy to monopolize. The trial court refused to submit Fraser's proposed jury instructions which would have made it clear that proof of a specific intent to monopolize, not proof of a relevant market, was required to establish Fraser's conspiracy to monopolize claim. *See* App. at 82a (proposed jury charge). The jury then returned a special verdict against

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[3] Fraser also alleged claims of actual and attempted monopolization in violation of §2 of the Sherman Act and claims of a violation of §7 of the Clayton Act. 284 F.3d, at 54-55. Those claims are not the subject of this petition.

[4] The trial also included Fraser's separate claims of actual monopolization and attempt to monopolize.

all of Fraser's §2 claims based *solely* on the trial court's relevant-market instructions. Judgment was thereafter entered against all of Fraser's claims.

The court of appeals affirmed the district court's judgment, but overturned its §1 analysis. *See* 284 F.3d, at 58. Specifically, the court of appeals set aside the district court's conclusion that the MLS Defendants were a single entity under the principles of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), noting that "the present case is not *Copperweld* but presents a more doubtful situation." 284 F.3d, at 58. Nevertheless, the court of appeals declined to remand Fraser's §1 claims, even though the court of appeals rejected the defendants' argument that, in trying them on remand, Fraser would be collaterally estopped from presenting evidence in support of a relevant market that was different from the one rejected by the jury in the §2 trial. *See id.*, at 59-60. The court of appeals justified its decision not to remand by erroneously assuming that if Fraser's §1 claims had gone to trial, Fraser *would* have presented the jury with the same relevant market claims and evidence it submitted in trying its §2 claims. *See id.*, at 60.

The court of appeals also rejected Fraser's argument that proof of a specific relevant market was not an essential element of a conspiracy to monopolize claim. In rejecting this argument and affirming the judgment below, the court of appeals conceded that it was adopting a minority position, which deepened the split among the circuit courts on this important issue of antitrust law and policy.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision ignores the text of the Sherman Act, misreads this Court's precedent, and deepens the split between the circuits on an antitrust issue of great significance. It subverts clear congressional intent manifest in the language of the statute by rendering the conspiracy to

monopolize offense entirely redundant. It also departs from this Court's holding that the offense of conspiracy to monopolize is legally distinct from the offenses of monopolization and attempt to monopolize. The decision further ignores the well-established principle that §2 claims based on a conspiracy are more suspect than those based on unilateral action and, therefore, do not require any showing of market power in a relevant market. The Court should grant the petition to resolve what has become a pervasive split among the circuits on an important issue of antitrust policy.

Further, the Court should also grant the petition to reverse the court of appeals' refusal to remand Fraser's §1 claims, based on a factual *assumption* of how Fraser *would* have tried the relevant market issue had its §1 claims gone to a jury trial. Once the court of appeals concluded that the summary judgment single-entity ruling of the district court was erroneous, its only proper course was to remand Fraser's §1 claims for a trial. The Court should grant the petition to make it clear that a court of appeals cannot usurp the jury's function in this manner.

I. THE COURT SHOULD RESOLVE THE GROWING CIRCUIT SPLIT ON WHETHER PROOF OF A SPECIFIC RELEVANT MARKET IS AN ESSENTIAL ELEMENT OF A § 2 CONSPIRACY CLAIM.

As the Court recognized long ago, when Congress enacted §2 of the Sherman Act, it intended to create three distinct causes of action: one for monopolization, another for attempt to monopolize, and a third for conspiracy to monopolize. *See American Tobacco Co. v. United States*, 328 U.S. 781, 787-90 (1946). The Court also recognized the intent of Congress to make a §2 conspiracy to monopolize a separate offense from a §1 conspiracy in restraint of trade. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 (1940) ("the

crime under §1 is legally distinct from that under §2"). As a majority of circuit courts have held, the principal way in which a conspiracy to monopolize claim is distinct from both other §2 and §1 Sherman Act violations is that the requirement of proof of market power in a relevant market is replaced by the requirement that the conspirators have acted together with the specific intent to monopolize. By erasing the distinction, the court of appeals undermined the intent of Congress to create a separate conspiracy to monopolize offense and seriously damaged antitrust policy.

A. The Court's Prior Decisions Demonstrate That Proof of a Specific Relevant Market Is Not an Essential Element of a Conspiracy to Monopolize Claim.

More than fifty years ago, the Court first addressed whether proof of market power in a relevant market is required in a §2 conspiracy case. *See American Tobacco*, *supra*, at 789. The Court's discussion of this issue was informed by an understanding, apparent from the text and structure of the Sherman Act, that Congress intended conspiracy to monopolize to be a separate offense from other provisions of the Sherman Act. The *American Tobacco* defendants were charged under §2 with both monopolizing and conspiring to monopolize. *See id.*, at 788. Because the monopolization claim was based on a joint enterprise, the defendants argued that punishing them for both offenses was a double jeopardy violation. *See id.* In response, the Court first noted that a "conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy." *See id.*, at 789 (quoting *United States v. Rabinowich*, 238 U.S. 78, 85 (1915)). The Court then held that the separate crimes of monopolizing and conspiracy to monopolize survived double jeopardy analysis because "[p]etitioners, for example, might have been convicted here of a conspiracy to monop-

olize without ever having acquired the power to carry out the object of the conspiracy, *i.e.*, to exclude actual and potential competitors from the cigarette field." *See id.*

The absence of any requirement to prove market power in a relevant market in a conspiracy to monopolize case was emphasized again by the Court in *United States v. Griffith*, 334 U.S. 100 (1948), in which the Court cited *American Tobacco* for the proposition that "a conspiracy to monopolize violates §2 even though monopoly power was never acquired." *Id.*, at 107 n.9. Since the only reason for establishing a relevant market in a monopolization case is to prove market power, there is no reason to impose such a requirement in a conspiracy to monopolize case.

In the context of the Sherman Act, it is well established that concerted behavior to monopolize is inherently more suspect than unilateral behavior to do so, thus warranting the deterrence of even incipient conspiracies:

> "The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decision making that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit . . . [o]f course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly." *Copperweld*, 467 U.S., at 768-69.

Indeed, it was this very distinction between concerted anticompetitive behavior and unilateral acts that was cited by the Court as support for its decision in *Spectrum Sports v.*

McQuillan, 506 U.S. 447 (1993), to require proof of market power in a relevant market in an attempt to monopolize case:

> "[S]ingle-firm activity is unlike concerted activity covered by §1, which 'inherently is fraught with anticompetitive risk.' For these reasons, §2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." *Id.*, at 459 (internal citations omitted).

This same distinction explains why a plaintiff alleging a conspiracy to monopolize should not be required to prove a specific relevant market, which clearly is not essential in the absence of a market power requirement.

Because Congress intended that conspiracy to monopolize be a distinct claim reaching anticompetitive behavior not covered by other provisions of the Sherman Act, the Court has long recognized that the elements of this offense are distinct from the elements of actual monopolization, attempt to monopolize, and §1 conspiracy in restraint of trade. The decision of the court of appeals, however, wipes out these distinctions and improperly interprets the conspiracy to monopolize offense as superfluous verbiage. If proof of a relevant market is an essential element of a conspiracy to monopolize claim, then no set of facts would prove a §2 conspiracy without also proving either a §1 conspiracy in restraint of trade, a §2 monopolization, or a §2 attempt to monopolize. That would be an unreasonable interpretation of the statutory language. *See Potter v. United States*, 155 U.S. 438, 446 (1894) (statutory language "cannot be regarded as mere surplusage; it means something").

B. Evidence of a Specific Intent to Monopolize Substitutes for Proof of Market Power in a Relevant Market in a Conspiracy to Monopolize Case.

This Court's prior cases discussing the §2 conspiracy offense implicitly recognize that the element of specific intent to monopolize serves the function that the requirement of proof of market power in a relevant market serves for other Sherman Act offenses. It ensures that only anticompetitive behavior is deterred and punished, while procompetitive behavior is not.

A specific intent to monopolize has a clear meaning in the context of the Sherman Act and carries a high evidentiary burden. It is the intent "to destroy competition or build monopoly," and it will not be found when an action is "predominantly motivated by legitimate business aims." *See Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 626-27 (1953). The element of specific intent to monopolize—combined with the requirement of concerted action—means that only concerted behavior intended to serve anticompetitive ends will be deterred and punished by §2.[5] When concerted behavior is intended to destroy competition or build a monopoly, it does not matter whether the actors have the power to achieve their objectives in a relevant

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[5]*See e.g., Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (CA9 1980) ("no particular level of market power or 'dangerous probability of success' has to be alleged or proved in a conspiracy claim where the specific intent to monopolize is otherwise apparent from the character of the actions taken"); *Salco Corp. v. General Motors Corp., Buick Motor Div.*, 517 F.2d 567, 576 (CA10 1975) ("Section 2 makes it unlawful to conspire to monopolize 'any part' of interstate commerce. Specific intent to monopolize is the heart of a conspiracy charge, and a plaintiff is not required to prove what is the 'relevant market.'").

market. Such concerted behavior is inherently anticompetitive and is of the kind that Congress intended to deter and punish in §2 of the Sherman Act.[6]

That is not to say that evidence of a relevant market might not be useful to a jury in assessing a claim of specific intent to monopolize. *See Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1182 (CA8 1982). However, that showing is not, and should not be, the same rigorous showing of "relevant market" that is required for claims based on unilateral monopolization or attempt to monopolize. But that is precisely the error the court of appeals affirmed here, when it approved the trial court's instruction that Fraser bore the burden of proving the existence of the specific relevant market that had been alleged as a threshold element of each of his §2 claims, including conspiracy to monopolize.[7]

Equally important, by requiring proof of a relevant market to support a conspiracy to monopolize claim, the court of appeals contravened congressional intent by making the conspiracy to monopolize offense underinclusive. The decision presupposes that there can be no §2 violation without proof of a relevant market. But that supposition ignores the

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[6] In this sense, concerted behavior with a specific intent to monopolize under §2 is analogous to the type of pernicious concerted behavior that is condemned as *per se* unlawful under §1 without proof of market power or relevant market. *See State Oil Co. v. Kahn*, 522 U.S. 3, 10 (1997).

[7] Even the court of appeals appeared to recognize that a conspiracy to monopolize may require a lesser showing of a relevant market than that required for other offenses under §2 of the Sherman Act: "there may in principle be some cases in which one could argue that a conspiracy claim should be provable without a showing that the alleged market is a real economic market." 284 F.3d, at 68. However, just as it did with Fraser's §1 claims, the court of appeals ignored its duty to remand this issue to the jury and instead decided the facts itself, holding that the conspiracy to monopolize asserted by Fraser did not pose a sufficient competitive threat to warrant a lessening of the relevant market requirement applicable to other §2 offenses. *See* 284 F.3d, at 69.

need to deter and punish concerted behavior with a specific intent to monopolize because of its lack of redeeming virtue and the threat that such conspiracies pose to competition policy. *Copperweld* and similar cases clearly acknowledge the intent of Congress to prohibit such concerted anti-competitive behavior, even when the parties do not have the power to fully effectuate the ends of their intended conspiracy. *See Am. Tobacco*, 328 U.S., at 789.

In the trial below, even though the jury concluded that Fraser's asserted market definition was too narrow to support a claim of actual monopolization or attempt to monopolize, they still should have been permitted to determine whether Fraser had proven that defendants had conspired with the specific intent to monopolize. Under the district court's instructions, the jury was blocked from reaching this critical issue because, once the jury found that Fraser had not proven the specific relevant market that had been alleged, the charge prevented it from continuing to deliberate. By conditioning the jury's consideration of the essential elements of a §2 conspiracy claim on a finding of Fraser's proposed relevant market, the district court improperly shielded a category of conspiratorial conduct with a specific intent to monopolize that Congress clearly intended to prohibit.[8]

C. The Court Should Grant the Petition to Resolve the Deepening Split Among the Circuit Courts.

It has now become apparent that the circuit courts will not be able to resolve their disagreement on whether proof of a specific relevant market is an essential element of a §2

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[8] While evidence of a specific intent to monopolize is often difficult to prove, even the court of appeals recognized the unique abundance of such evidence in this case, in which numerous documents and business plans demonstrated that defendants in fact conspired with the specific intent to exclude competing Division I leagues in order to enable MLS to pay its players below-market salaries. 284 F.3d, at 59.

conspiracy claim without the guidance of this Court. The split of authority on this issue is longstanding and deep. The majority view, endorsed by the Fourth, Eighth, Ninth, Tenth, Eleventh, and Federal circuits, adheres to the formulation drawn from *American Tobacco*, and holds that proof of a relevant market is not required.[9] *See* ABA SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-100 to C-102 n.3 (1999 ed.) The First, Fifth, and Eleventh Circuits take the opposite view.[10] The Second Circuit has taken both positions, without reconciling them.[11]

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[9] *See, e.g., Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1363 (CA Fed. 1999) ("a [conspiracy to monopolize] claim requires deliberate concerted action with the specific intent to achieve an unlawful monopoly, accompanied by acts in furtherance of the conspiracy"); *Advanced Health-Care Serv., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150 (CA4 1990) (same); *Monument Builders of Greater Kansas City, Inc. v. Am. Cemetery Ass'n of Kansas*, 891 F.2d 1473, 1484 (CA10 1989) ("Conspiring to monopolize is a separate offense under section 2, requiring less in the way of proof than the other section 2 offenses." (quoting *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1371 (CA10 1979)); *Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432, 438 (CA10 1983) (holding that for a conspiracy to monopolize claim, "[a] relevant market need not be established"); *Alexander, supra*, at 1181 ("A section 2 claim for conspiracy to monopolize . . . generally does not require proof of a relevant market, at least not in the manner required in actual and attempted monopolization cases."); *Hunt-Wesson Foods, supra*, at 926. The court of appeals' reliance on *Alexander* as a case requiring a showing of a relevant market, 284 F.3d, at 67 n.16, is misplaced. While *Alexander* required some proof of product and geographic context, it held that "[t]he nature of such proof, . . . need not be as rigorous as the relevant market showing for other Section 2 claims, because actual attainment or 'dangerous probability' of monopoly power is not at issue in a conspiracy claim." 687 F.2d, at 1182.

[10] *See Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 67-69 (CA1 2002); *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 311 (CA5 1997); *Bill Beasley Farms, Inc. v. Hubbard Farms*, 695 F.2d 1341, 1343 (CA11 1983).

[11] *Compare Volvo North Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 74 (CA2 1988) ("Under §2 of the Sherman Act, the

Academic commentators have recognized the split in the circuits, which has existed for many years.[12] Numerous district courts have increasingly been called upon to address alleged §2 conspiracies,[13] but, like the circuits, they have not

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offense of conspiracy to monopolize requires proof of (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize."); *United States v. Consol. Laundries*, 291 F.2d 563, 573 (CA2 1961) (relevant market need not be proven to establish a §2 conspiracy); *with Elec. Communications Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 246 (CA2 1997) (erroneously citing *Spectrum Sports* for the proposition that a "defendant's power in the relevant market must be established" in a conspiracy to monopolize case and failing to reference inconsistent circuit authority).

[12] *See* 1 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION §2.03, at 2-15 (2nd ed. 1999); 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶809 (rev. ed. 1996); 2 EARL W. KINTNER, FEDERAL ANTITRUST LAW, PRACTICES PROHIBITED BY THE SHERMAN ACT §14.6 (1980).

[13] *See, e.g., Intellective, Inc. v. Mass. Mut. Life Ins. Co.*, 190 F.Supp.2d 600, 614 (S.D.N.Y. 2002); *U.S. Info. Systems, Inc. v. Int'l Broth. of Elec. Workers Local Union Number 3, AFL-CIO*, 2002 WL 91625 at *9 (S.D.N.Y. Jan. 23, 2002); *DeLoach v. Philip Morris Co.*, 2001 WL 1301221, at *4 (M.D.N.C. July 24, 2001); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.—Conn.*, 144 F.Supp.2d 558, 589 (W.D. Va. 2001); *Floors-N-More, Inc. v. Freight Liquidators*, 142 F.Supp.2d 496, 502 (S.D.N.Y. 2001); *Lantec, Inc. v. Novell, Inc.*, 146 F.Supp.2d 1140, 1150 (D. Utah 2001); *Urdinaran v. Aarons* 115 F.Supp.2d 484, 491 (D. N.J. 2000); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.—Conn.*, 108 F.Supp.2d 549, 588 (W.D.Va. 2000); *Paladin Assoc., Inc. v. Montana Power Co.* 97 F.Supp.2d 1013, 1039 (D. Mont. 2000); *Visa Check/ Mastermoney Antitrust Litig.*, 192 F.R.D. 68, 81 (E.D. N.Y. 2000); *Discon, Inc. v. NYNEX Corp.*, 86 F.Supp.2d 154, 157 (W.D. N.Y. 2000); *New Park Entm't L.L.C. v. Elec. Factory Concerts, Inc.* 2000 WL 62315 *1 (E.D. Pa. 2000); *Santana Prods., Inc. v. Sylvester & Assoc., Ltd.*, 121 F.Supp.2d 729, 735 (E.D. N.Y. 1999); *Alabama Ambulance Serv., Inc. v. City of Phoenix City, Alabama*, 71 F.Supp.2d 1188, 1196 (M.D. Ala. 1999); *Modesto Irrigation Dist. v. Pacific Gas & Elec. Co.*, 61 F.Supp.2d 1058, 1066 (N.D. Cal. 1999); *Dyno Nobel, Inc. v. Amotech Corp.*, 63 F.Supp.2d 140, 150 (D. Puerto Rico 1999).

been able to reach a consensus on whether proof of a specific relevant market is an essential element of a §2 conspiracy claim.[14]

The time has come for this Court to settle the split in the circuits. As businesses increasingly consolidate in response to changes in the global economy, it has become more important than ever before to have one consistent and coherent national antitrust policy. The circuit court split on the requirements for proving a conspiracy to monopolize makes it impossible for businesses and individuals to plan and conduct their affairs with any degree of certainty. Subjecting competitors to varying and incompatible standards of antitrust behavior imposes arbitrary risks that are destructive of antitrust policy.

The prevailing circuit split on the elements of a conspiracy to monopolize offense also encourages undesirable forum shopping and the perception of disparate treatment. Under the current state of the law, Fraser would have been entitled to its requested jury instructions had the case been brought in St. Louis or Denver instead of Boston. In New York, this issue might have been decided either way. This unequal treatment of the same claims in different circuits is fundamentally at odds with the objective of having a coherent national antitrust policy.

In recent years, the Court has taken pains to articulate one set of national standards that apply to claims under §1 of the Sherman Act, *See, e.g., State Oil v. Kahn*, *supra*; *Palmer v. BRG of Georgia, Inc.* 498 U.S. 46 (1990). It also has granted certiorari to resolve a split among the circuits on the essential elements of an attempt to monopolize claim. *See Spectrum Sports*, *supra*. Unless the Court also resolves the deepening split on the elements that are necessary to prove a conspiracy

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[14] *Compare Lantec*, 146 F.Supp.2d, at 150; *Virginia Vermiculite*, 108 F.Supp.2d, at 588-91; *with Davies v. Genesis Med. Ctr. Anesthesia & Analgesia, P.C.*, 994 F.Supp. 1078, 1101 & n.9 (S.D. Iowa 1998).

to monopolize, its careful efforts to provide guidance on what conduct is and is not a Sherman Act violation will be thwarted.

II. THE COURT SHOULD ALSO GRANT THE PETITION TO SEND A MESSAGE THAT COURTS OF APPEALS MAY NOT DENY A PLAINTIFF THE RIGHT TO A JURY TRIAL BY ASSUMING WHAT FACTS THE PLAINTIFF WOULD HAVE PRESENTED HAD SUCH A TRIAL TAKEN PLACE.

The right to a jury trial in civil cases "is a basic and fundamental feature of our system of federal jurisprudence . . . [a] right so fundamental and sacred to the citizen [that it] should be jealously guarded by the courts." *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 580 (1990). The court of appeals' decision not to remand Fraser's §1 claims, after it held that the district court had erroneously granted summary judgment against such claims under a misreading of *Copperweld*, denied Fraser this vital right. Unless reversed, the decision threatens to establish a dangerous precedent under which courts of appeals can deny plaintiffs jury trials by simply making factual assumptions about what *might* have happened had such trials taken place.

The court of appeals rejected the district court's "single-entity" analysis under *Copperweld*, which the lower court had improperly relied upon to grant summary judgment against Fraser's §1 claims. *See* 284 F.3d, at 58. It also rightly concluded that Fraser would not have been collaterally estopped from arguing a different relevant market in support of his §1 claims on remand, had Fraser been given an opportunity to do so. *Id.*, at 59-60. With these two holdings, the court of appeals should have concluded that an error of law by the district court deprived Fraser of the right to present his §1 claims to a jury, thus requiring that the §1 claims be

remanded for trial. Were this a collateral proceeding brought in a parallel court, the fact that the relevant market issue for a §1 claim had never been presented to the jury in the first trial would, by itself, foreclose dismissing the second trial because of issue preclusion. "A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action." RESTATEMENT (SECOND) OF JUDGMENTS §27 com. e (1980).

The court of appeals' decision not to remand Fraser's §1 claims, because of its factual assumptions about how Fraser would have tried the relevant market issue in a §1 trial, was not only a procedural error, it was an abrogation of Fraser's constitutional right to a jury trial. As this Court has made clear, when a district court's error prevents a party from trying an issue to a jury, a reviewing court should remand. Describing its own jurisprudence on this issue in *Lytle v. Household Mfg., Inc.*, the Court noted that when a district court's error results in a "wrongful denial of a petitioner's right to a jury trial on legal issues," the proper result is to reverse and remand for a jury trial. *See* 494 U.S. 545, 552-53 (1990). Indeed, when a claim has not been tried to a jury because of a legal error, remand and trial is "essential to vindicating . . . Seventh Amendment rights." *Id.*, at 553.

The court of appeals' determination not to remand Fraser's §1 claims put it in the wholly improper position of speculating about what type of relevant market Fraser would have presented had a §1 trial been conducted. This factual speculation was clearly beyond the court's institutional competence. Moreover, the court of appeals' factual speculation was wrong. In the absence of any *Copperweld* defense, the agreement of the MLS Defendants not to compete for players was a facially anticompetitive horizontal agreement that should have been judged under the "quick look" rule-of-reason test, for which plaintiffs need not prove any relevant market. *See, e.g., California Dental Ass'n v.*

FTC, 526 U.S. 756, 770 (1999); *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 109-10 (1984). Fraser, therefore, could have tried his §1 claims without the need to prove any relevant market at all.

Further, even if it were proper to try Fraser's §1 claims under a full blown rule-of-reason analysis, it does not follow "that had the district court allowed the section 1 claim, it too would have been defeated by the jury's finding that the market alleged in the complaint had not been proved." 284 F.3d, at 60-61. Had Fraser been given an actual opportunity to try his §1 claims, he would have had an "incentive to allege a broader market" than under §2, because less market power is required to prevail in a §1 claim. *Id.*, at 60.

Nor could the court of appeals justify its refusal to remand by speculating that the district court might have refused to allow Fraser to amend his pleadings to allege a different market in support of his §1 claims. 284 F.3d, at 60. It is well established that pleadings are generally deemed amended to conform to the evidence adduced at trial.[15] Further, a court of appeals cannot divest a trial court of its discretion to allow an amendment of the pleadings by deciding the issue in the first instance. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). The decision as to whether to allow an amendment depends on "[w]hat the plaintiff knew or should have known and what he did or should have done," *Leonard v. Perry*, 219 F.3d 25, 30 (CA1 2000), an issue that must be determined by the trial court.

As this Court has stated, "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming

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[15] *See, e.g., Sauers v. Alaska Barge*, 600 F.2d 238, 244 (CA9 1979); *J.J. Theatres, Inc. v. Twentieth Century-Fox Films Corp.*, 212 F.2d 840, 844-45 (CA2 1954); FED. R. CIV. P. 15(b).

curtailment of the right to a jury trial should be scrutinized with the utmost care.'" *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959). For this additional reason, the Court should grant this petition and leave no doubt that courts of appeals cannot deny parties their right to a jury trial by factually speculating—and then hypothetically rejecting—what the parties *might* have done at such a trial.

CONCLUSION

For all of these reasons, Petitioners respectfully ask the Court to grant this petition for a writ of certiorari.

Respectfully submitted,

JAMES W. QUINN
JEFFREY L. KESSLER
GREGORY S. COLEMAN *
MICHAEL A. RONA
JOHN F. GREENMAN
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

* Counsel of Record

Counsel for Petitioners